Supreme Court

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

EDDIE S. CASTLEBERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Hobbs Act, which prohibits extortion and robbery, and has a jurisdictional element within the statute requiring proof that the extortion "in any way or degree obstructs, delays, or affects commerce or the movements of any article or commodity in commerce" is, for that reason, distinguishable from the Gun-Free School Zones Act, which prohibits firearms in a school zone and has no jurisdictional element, so that the Hobbs Act requires the government to prove only a *de minimus* affect on interstate commerce, as held in *United States v. Castleberry*, 116 F.3d 1384 (11th Cir. 1997) while the Gun-Free School Zones Act requires the government to prove a substantial affect on interstate commerce, as held in *United States v. Lopez*, 514 U.S. 549 (1995)?

2. Whether the trial court's instruction violated *United States v. Gaudin*, 115 S.Ct. 2310 (1995) by removing from the jury's determination a required element of the crime when it charged that if the jury believed any of the three theories from "the Government's evidence regarding the impact on interstate commerce beyond a reasonable doubt, then, as a matter of law, the jurisdictional requirements of the Hobbs Act relating to interstate commerce under Section 1951 of Title 18 of the United States Code have been met?"

3. Whether a trial court's instruction which violated *United States v. Gaudin*, 115 S.Ct. 2310 (1995) by removing from the jury's determination a required element of the crime, can ever be "harmless error" when the defendant did not admit the element in question?

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PETITION FOR WRIT OF CERTIORARI

Eddie Castleberry, Petitioner, prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 23, 1997, because the Eleventh Circuit and other Circuit Courts of Appeals have decided an important question of federal law that has not been, but should be, settled by this Court and because the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court (Issue I), because the Eleventh Circuit has decided an important question of federal law in a manner that conflicts with relevant decisions of this Court (Issue II), and in order to resolve conflicts between the Eleventh Circuit and other United States Courts of Appeals (Issue III).

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 116 F.3d 1384 (11th Cir. 1997).

JURISDICTION

The conviction of the Petitioner Eddie Castleberry was affirmed by the United States Court of Appeals for the Eleventh Circuit on June 23, 1997. This Court's jurisdiction to review the Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Title 18 U.S.C. § 1951 is reprinted in the Appendix and below:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of

Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be constructed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT

A. FACTS

Petitioner, an attorney, was convicted by a jury of conspiring to and committing extortion under 18 U.S.C. § 1951 (the "Hobbs Act") by paying money to an Assistant Solicitor of the City of Atlanta Traffic Court (the "Atlanta Traffic Court") to dispose of Driving Under the Influence ("DUI") prosecutions against clients of Petitioner. An essential element of the Hobbs Act violations charged was that the extortionate conduct, here the payment of money to dispose of DUI prosecutions in the Atlanta Traffic Court, "obstructs, delays or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). At trial the government sought to prove this required interstate commerce element in three ways.

First, the government presented evidence that the claimed bribes of the Assistant City Solicitor caused the City of Atlanta to be deprived of a total of approximately $10,000 in revenue from fines. The government conceded that this loss of $10,000 in revenue to the City of Atlanta from a two billion dollar budget during the relevant time

period (0.0005% of total revenues) resulted at best in a "minimal" impact on the operations of the City of Atlanta.

Second, the government offered evidence that under 23 U.S.C. § 402, the National Highway Traffic Safety Administration had funded a special DUI task force in Atlanta, Georgia from 1991 through 1994. If conviction rates in Atlanta Traffic Court were deemed to be too low, it could have caused these funds to be withdrawn. This consequence never happened with regard to the money provided to the City of Atlanta.

Third, the government offered generalized evidence that if it became widely known that DUI offenders were not properly prosecuted through conviction in court in a particular jurisdiction, this circumstance could increase the number of automobile drivers who drove while impaired by alcohol, which would then result in a higher number of accidents. These accidents would result in increased Medicaid and Medicare costs, as well as an increase in disability and survivor's benefits under Social Security. *See generally, United States v. Castleberry*, 116 F.3d 1384, 1388 (11th Cir. 1997).

The government conceded during the presentation of the above evidence that its evidence proved only a "minimal" or "*de minimis*" and indirect effect on interstate commerce flowing from the activities charged in this case.

The District Court accepted the government's position that "a minimal effect on interstate commerce" was all that was required to satisfy the interstate commerce element of the Hobbs Act and on this basis denied the Defendant's motions for judgments of acquittal under

Rule 29. The District Court also rejected the Petitioner's request to charge that in order to convict it must find that the Petitioner's conduct had a substantial and direct effect on interstate commerce. Instead, the District Court instructed the jury as follows:

> While it is not necessary that the government prove that the Defendant specifically intended to interfere with interstate commerce, it is necessary concerning this issue that the government prove that the natural consequences of the acts alleged in the Indictment would delay, interrupt or adversely affect interstate commerce. The phrase "interstate commerce" means the flow of commerce or business activities between two or more states. It also means commerce between places within the same state but passing through any place outside of that state. I instruct you that if you believe beyond a reasonable doubt that the Defendant committed extortion as charged in the Indictment and you believe the government's evidence regarding the impact of interstate commerce beyond a reasonable doubt, then as a matter of law the jurisdictional requirements of the Hobbs Act relating to interstate commerce under § 1951 of Title 18 United States Code have been met.

The Eleventh Circuit Court of Appeals concluded that the case of *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) which required a substantial affect on interstate commerce under a statute *without a jurisdictional element* in its text is distinguishable on that basis and therefore defeats Castleberry's argument. The appellate court said further that although the

instruction which included the term "as a matter of law" was "a bit odd," it did not misstate the interstate commerce issue "in such a substantial way as to violate due process." *United States v. Castleberry*, 116 F.3d 1384, 1387, 1389 (11th Cir. 1997).

B. PROCEDURAL HISTORY

The defendant, Eddie Castleberry, an attorney, was indicted on September 5, 1995, and charged with one count of conspiracy to commit extortion under Title 18 U.S.C. § 1951 and four substantive counts of extortion under Title 18 U.S.C. § 1951, and § 2, aiding and abetting.

On Febrary 12, 1996, the matter proceeded to trial before the Honorable Willis B. Hunt, Jr. A jury verdict of guilty was returned on all five counts on February 22, 1996.

On May 2, 1996, the defendant was sentenced to the custody of the Attorney General for a period of 40 months, a special assessment of $250.00, and three years of supervised release.

On June 23, 1997, the Eleventh Circuit Court of Appeals affirmed the defendant's conviction. Defendant's timely application for a stay of the mandate was denied on August 6, 1997. The judgment was issued as the mandate of the Court on August 8, 1997.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *UNITED STATES V. LOPEZ*, A RELEVANT DECISION OF THIS COURT

A. Introduction

The decision of this Court in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), required that the government prove under the Gun-Free School Zones Act that the activity in question substantially and directly affected interstate commerce. The government conceded at trial that in this Hobbs Act case, its evidence did not meet that standard. All the government could show was a minimal or *de minimis* effect on interstate commerce. Nevertheless, the District Court instructed the jury that a *de minimis* effect on interstate commerce was sufficient.

The Court of Appeals for the Eleventh Circuit sustained Petitioner's convictions and held that *Lopez* is distinguishable because the statute in that case had no jurisdictional element and the Hobbs Act has a jurisdictional element under which the government must show that the interstate activity "in any way or degree obstructs, delays, or affects commerce or the movements of any article or commodity in commerce."

According to the government's argument in this case, any impact on interstate commerce from claimed extortionate activity, no matter how small or indirect, is sufficient to prove a Hobbs Act violation and sufficient to withstand a constitutional challenge under the Commerce Clause or the Tenth Amendment. This distinction would render the *Lopez* decision meaningless in the context of most federal criminal statutes. Therefore, pursuant to Rule 10(c) of the Supreme Court Rules, this case raises an important question of federal law that has not been, but should be, settled by this Court, and has also decided an important federal question in a way that conflicts with a relevant decision of this Court.

B. The Holding in Lopez.

In *Lopez*, this Court analyzed the history of the case law interpreting the Commerce Clause in which the Court has struggled with the contours of congressional power in our federal system of government. The Court noted that past cases reflect a concern that given the "dual system of government" created by the Constitution, the Commerce Clause not be interpreted "so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* 1628-1629, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624 (1937). Accordingly, the Court held that in order for intrastate activity to be subject to federal criminal prosecution it must have a "substantial economic

effect on interstate commerce." *Id.* at 1629, quoting *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89 (1942). Congress is not empowered to use a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private matters." *Id.* at 1629, citing *Maryland v. Wirtz*, 392 U.S. 183, 197, n.27, 88 S.Ct. 2024, n.27 (1968).

After reaffirming these broad general principles, this Court in *Lopez* concluded that Congress is empowered under the Commerce Clause to regulate three categories of activities: (1) the channels of commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce and (3) "those activities that substantially affect interstate commerce." *Id.* at 1629-1630.

As to this third area, the only area applicable to this case, the Court noted that the case law has been sometimes confusing and conflicting as to whether the activity must merely "affect" or "substantially affect" interstate commerce to empower Congress to regulate the activity under the Commerce Clause. *Id.* at 1630. The Court in *Lopez* expressly stated its determination to resolve this conflict and held, "[w]e conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 1630. Legislation regulating an economic activity is to be sustained under the Commerce Clause only "where economic activity substantially affects interstate commerce." *Id.* at 1630.

The Court of Appeals, however, held that *Lopez* does not apply to the Hobbs Act because the statute at issue in *Lopez* (the Gun-Free School Zones Act of 1990) had no

jurisdictional element, while the Hobbs Act has a specific requirement included in the statute that the criminal conduct affect interstate commerce. *United States v. Castleberry*, 116 F.3d 1384, 1387 (11th Cir. 1997). Although this is an important distinction between the two statutes, it does not make the essential teaching and reasoning of *Lopez* inapplicable. While the failure to include a jurisdictional element in the Gun-Free Schools Zones Act of 1990 made that statute *as a whole* unconstitutional, because of the lack of a sufficient interstate commerce nexus, the inclusion of a jurisdictional element in the Hobbs Act saves the statute on its face, but, as applied, nevertheless still requires that each particular Hobbs Act prosecution be a valid exercise of Congressional power under the Commerce Clause.

If you assume that Congress intended in the Hobbs Act to exert its power to the maximum extent allowed by the Commerce Clause,[1] then the reach of the Commerce Clause, as explained in *Lopez*, becomes the limiting factor on a Hobbs Act prosecution. Accordingly, the evidence in the particular Hobbs Act prosecution must show a "substantial" and "direct" effect on interstate commerce which is not trivial or remote.

In short, *Lopez* reinvigorated the restrictions of the Commerce Clause, and by implication the prohibitions of the Tenth Amendment, by placing boundaries on the federal police power which many had thought prior to

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[1] *See Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272 (1960).

Lopez was without practical limits. The jurisdictional element cannot be satisfied by evidence of only a minimal or *de minimis* and indirect effect on interstate commerce, which the government has conceded is all it could potentially prove in this case. Nor can the jurisdictional element be satisfied by aggregating the effect on interstate commerce of all crimes similar to that charged here. Virtually any crime, when considered in the aggregate, affects interstate commerce, including crimes which have traditionally always been prosecuted solely by the states, such as burglary, shoplifting, aggravated assault, homicide and even sexual offenses. To allow aggregation of similar crimes would deprive *Lopez* of any practical meaning.

C. The Decisions of Other Circuits.

Other circuit courts which have addressed this question, directly or indirectly, have reached the same conclusion as the Eleventh Circuit Court of Appeals. *United States v. Stillo*, 57 F.3d 553, 558, fn. 2 (7th Cir. 1995); *United States v. Farmer*, 73 F.3d 836, 843 (8th Cir. 1996); *United States v. Atcheson*, 94 F.3d 1237, 1241-1243 (9th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 398-400 (10th Cir. 1995). Indeed, the Court of Appeals here merely adopted the holdings and reasoning of these decisions. *United States v. Castleberry*, 116 F.3d at 1387.

D. Certiorari Should be Granted.

The only way to place any meaningful limitation on such potential plenary federal police power is to interpret

the Hobbs Act, as proposed by the Petitioner, to require that any particular robbery or extortion prosecuted under the Hobbs Act have itself a substantial effect on interstate commerce. The government can satisfy its interstate commerce nexus requirement with a showing similar to the fact pattern in *United States v. Robertson*, 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995), decided in conjunction with *Lopez*, where the particular facts of the case being prosecuted involved substantial interstate effects. Otherwise, "any robbery (or extortion), in our closely-interwoven economy, arguably would affect interstate commerce." *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

The decision of the Court of Appeals ignores this holding in *Lopez* and rejects its application to the Hobbs Act. This Court has yet to explain whether *Lopez* can be so limited. Therefore, a writ of certiorari should be granted because this case affords this Court the opportunity to clarify the scope and extent of its ruling in *Lopez*.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS PERMITS THE PETITIONER'S CONVICTIONS TO STAND DESPITE THE FACT THAT THE DISTRICT COURT REMOVED FROM THE JURY THE ULTIMATE DETERMINATION OF A REQUIRED ELEMENT OF THE OFFENSES WITH WHICH HE WAS CHARGED, CONTRARY TO THE HOLDING OF THIS COURT IN *UNITED STATES V. GAUDIN*.

A. Introduction.

In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313, 132 L.Ed.2d 444 (1995), this Court held that a

criminal defendant is entitled under the Fifth and Sixth Amendments to the United States Constitution to "a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." This Court went on to hold that "[t]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 2316.

Here, contrary to *Gaudin*, the District Court instructed the jury merely to determine whether it believed "the government's evidence" regarding the interstate commerce element of the Hobbs Act violations charged and directed the jury that if it found these facts then that element had been proven "as a matter of law." (R:11-1490). The jury was never asked to apply the law to the facts in order to determine whether the necessary interstate commerce effect had been proven beyond a reasonable doubt under any legal standard, whether that be a "substantial effect" standard as Petitioner contends or a "minimal effect" standard as the Government urges.

This failure to submit to the jury the ultimate and complete determination of every element of the offenses for which the Petitioner was charged violated the Petitioner's Fifth and Sixth Amendment rights under the holding in *Gaudin*. The jury was asked merely to find facts but not to apply the law to those facts. Accordingly, the decision of the Court of Appeals affirming the Petitioner's convictions, despite this clear *Gaudin* error, was a decision on "an important federal question in a way that conflicts with relevant decisions of this Court," calling for review by this Court of the decision of the Court of

Appeals by writ of certiorari pursuant to Rule 10(c) of the Supreme Court Rules.

B. The District Court Violated *Gaudin*.

Gaudin involved a false statement to a federal agency prosecution under 18 U.S.C. § 1001, where an element of the offense is that the false statement be "material" to the agency's inquiry. The District Court there, however, told the jury that although materiality was an issue to be determined by the jury, because it was an element of the offense, they were nevertheless required to conclude and were so "instructed" by the Court "that the statements charged in the indictment are material statements." *Gaudin*, 115 S.Ct. at 2313. This Court held that this instruction violated the defendant's constitutional rights to a jury determination of every essential element of the crime with which he was charged.

Similarly, here, the District Court did not allow the jury to make the ultimate determination of guilt or innocence, at least with respect to the interstate commerce issue. The jury was not instructed that before it could find guilt it must find from the evidence beyond a reasonable doubt that the extortionate activity charged in the indictment had an impact on interstate commerce. Instead, as in *Gaudin*, it was told that if it believes "the government's evidence," (which comprised three separate and distinct government theories as to how the interstate commerce connection was proven), then this element had been proven "as a matter of law."

Just as in *Gaudin*, the District Court here took away from the jury the determination of an essential element of the offense. As a result, the application of the law to the facts, to which the Defendant was entitled to a jury determination under *Gaudin*, was instead preempted by the District Court in its instructions.

C. The Court of Appeals Misunderstood *Gaudin*.

The Eleventh Circuit Court of Appeals ignored the fact that the instruction here separated the jury's dual role of both fact-finding and law-applying. Instead, the Court of Appeals opined that although the District Court's instruction was "a bit odd," it still believed that the jury had in effect decided the interstate commerce issue, or at least they had not been misled by the District Court's instruction as to their proper role "in such a substantial way as to violate due process." 116 F.3d at 1389. Without explaining further its analysis of what the term "as a matter of law" meant in the context of the District Court's instruction or how the jury would have performed its law-applying role when it was told that the "government's evidence" constituted proof of the interstate commerce element "as a matter of law," the Court concluded that "[i]t is clear to us that the jury decided the interstate commerce element." 116 F.3d at 1389.

The Court of Appeals fundamentally misunderstood *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). If the jurisdictional nexus is in fact an element of a Hobbs Act violation, as the Government concedes, a criminal defendant is entitled to have that element, along with all other elements, decided clearly

and in its totality by the trial jury. It is not good enough for the jury merely to decide the "facts" and for the District Court to decide, as it did in its instruction here, that the issue of how to apply the law to those facts was already determined "as a matter of law." An "odd" instruction, which attempts to separate these functions, leaving the jury with only the fact-finding role and removing from the jury the law-applying function, does not satisfy *Gaudin* and, contrary to the conclusion of the Court of Appeals, is not "close enough" for Fifth and Sixth Amendment purposes under *Gaudin*.

As this Court in *Gaudin* held, there is "absolutely no historical support" for separating the jury's fact-finding and law-applying roles. 115 S.Ct. at 2314-2316. Certain elements of an offense, such as the materiality element in *Gaudin* or the jurisdictional element here, cannot be termed "legal" questions which the jury need not decide. After all, in our system of criminal justice, juries render "a general verdict pronouncing the defendant's guilt or innocence," and are not asked "to produce mere 'factual findings,' " similar to "special interrogatories" sometimes used in civil cases. 115 S.Ct. at 2315. In a criminal case "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." 115 S.Ct. at 2316. But, under the District Court's instruction here, affirmed by the Court of Appeals, all the jury was asked to do is find facts. It was never asked to apply the law to those facts.

Moreover, although the Petitioner cannot point to a specific conflict among circuit court decisions regarding instructions on the particular jurisdictional element at

issue here, it is worth noting that the actual practice of the different circuits varies on this issue. Under the decision of the Court of Appeals here and the decision of the Fifth Circuit in *United States v. Parker*, 104 F.3d 72, 73 (5th Cir. 1997), the type of instruction given here, although characterized as "odd", is permitted in the Fifth and Eleventh Circuits. No other circuit has expressly endorsed this instruction and the published "pattern instructions" of all other circuits do not permit it. *See, e.g., Federal Criminal Jury Instructions of the Seventh Circuit*, Vol. II, p. 66; *Ninth Circuit Manual of Model Jury Instructions, Criminal*, (1995 Ed.), 58.31A, p. 224; *Pattern Criminal Jury Instructions*, Federal Judicial Center (1988 Ed.), § 100, p. 134. Indeed, the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, (1994 Ed.), § 6.18, 1951, pp. 267-268, recommends a permissive rather than mandatory instruction, as here, and states in the applicable "Notes on Use," "[A]lthough some courts have held that the jury may be instructed as a matter of law that interstate commerce has been shown if various facts are proven, this (a recommended permissive instruction) appears to be the safer instruction." Thus, there is a significant split among the circuits in their actual practice regarding instructions on the interstate commerce element of a Hobbs Act violation, further calling for Supreme Court review of this issue under the rationale of Rule 10(a) of the Supreme Court Rules, whose purpose is to make uniform the practice in the lower federal courts.

D. Certiorari Should be Granted.

The District Court's instruction deprived the Petitioner of his constitutional right to have *all* elements of the offenses for which he was charged determined in their totality by the jury. Accordingly, *Gaudin* error clearly occurred. The opinion of the Court of Appeals here is a decision on "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). For this reason a writ of certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THERE EXISTS A SUBSTANTIAL CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER THE FAILURE OF THE JURY TO DETERMINE EVERY ELEMENT OF AN OFFENSE CHARGED CAN BE HARMLESS ERROR WHEN THE DEFENDANT DID NOT ADMIT THIS ELEMENT AT TRIAL.

A. Introduction.

The more serious question posed by this case is not whether *Gaudin* error occurred – it clearly did – but whether or not depriving a defendant of his constitutional right to have every element of his offense determined by the jury can ever be harmless, and if so, whether it was harmless here. This Court recently decided that the failure to instruct a jury as to an element of the offense when no objection has been made at trial is not necessarily plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544 (1997). This Court has also

granted a writ of certiorari on the issue of whether the "failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element." *Rogers v. United States*, ___ U.S. ___, 117 S.Ct. 1841 (1997). But, this Court has not yet decided the issue raised by this case, *i.e.*, whether the failure to instruct the jury on a required element of a criminal offense can be harmless error when a timely objection was made and when the defendant did not admit this element at trial, nor has the Court granted certiorari in any case raising this issue.

There is substantial conflict among the circuits on this issue. Moreover, this case affords the Court the opportunity to decide the question not posed in *Rogers*, *i.e.*, can the failure to instruct on a required element be harmless when the defendant has not admitted the element. As such, this case is an appropriate companion case to *Rogers*?

B. The Circuit Court Conflict.

The split among the Circuit Courts is stark. The First, Fifth, Seventh and Ninth Circuits have held that *Gaudin* error can never be harmless, relying primarily on *Sullivan v. Louisiana*, 508 U.S. 275, 278-81, 113 S.Ct. 2078, 2081-2082, 124 L.Ed.2d 182 (1993). *United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995); *United States v. DiRico*, 78 F.3d 732, 737-738 (1st Cir. 1996); *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996); *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996); *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994). The Eighth Circuit and the *en banc* Fifth Circuit (*dicta*) have held otherwise. *United*

States v. Raether, 82 F.3d 192, 194 (8th Cir. 1996); *United States v. Parker*, 104 F.3d 72, 73 (5th Cir. 1997) (*en banc*).

The Fourth Circuit has found a middle ground. According to the Fourth Circuit, a *Gaudin*-type error can be harmless only "where the jury has made an independent finding on the equivalent or identical element of the crime" that was not submitted to the jury for decision. *United States v. Aramony*, 88 F.3d 1369, 1384 (4th Cir. 1996); *United States v. Johnson*, 71 F.3d 139, 143-44 (4th Cir. 1995); *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996).

There appears to be a "split" within the Eleventh Circuit. In *United States v. Medina*, 90 F.3d 459, 464 (11th Cir. 1969), the trial court, for all practical purposes, took away from the jury's consideration the jurisdictional element of the former 28 U.S.C. § 955(a).[2] The Court unequivocally stated that "a directed verdict in a criminal trial, either in whole or part, cannot be viewed as harmless." However, in a later Eleventh Circuit decision, *United States v. Rogers*, 94 F.3d 1519, 1524-1527 (11th Cir. 1996), the Court opined that in certain limited situations taking an element of the offense away from the jury could be deemed harmless error.

Curiously, the *Rogers* decision does not even cite *Medina*. The Court in *Rogers*, however, candidly observed in a footnote that, given the "discord" in the case law and the conflicts among the circuits reflecting "the gravity" of the question being decided, "further guidance and clarification (ostensibly from the Supreme Court) would be

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[2] Now 46 U.S.C. App. § 1903(a).

extremely helpful." 94 F.3d at 1524, n. 11. This Court answered this request by granting certiorari in *Rogers*, ___ U.S. ___, 117 S.Ct. 1841 (1997).

C. The Holding of *Sullivan v. Louisiana*.

Petitioner, of course, agrees with the analysis of those Circuit Courts which hold that *Gaudin* error can never be harmless, in particular *United States v. DiRico*, 78 F.3d 732, 736-738 (1st Cir. 1996) and *United States v. Pettigrew*, 77 F.3d 1500-1511 (5th Cir. 1996). Those decisions rely heavily upon this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993), involving a defective reasonable doubt instruction resulting in the jury's failure to determine each element of the offense by the constitutional standard of proof beyond a reasonable doubt.

The essential problem with a *Gaudin* error is that our constitutional criminal justice system is fundamentally based upon trial by jury, not by a judge or a panel of judges. *Sullivan v. Louisiana*, 508 U.S. at 277, 113 S.Ct. at 2080; *Carrella v. California*, 491 U.S. 263, 268, 109 S.Ct. 2419, 2422, 105 L.Ed.2d 218 (1989) (SCALIA, J., concurring) ("A defendant may assuredly insist upon observance of this guarantee (right to jury determination of guilt) even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt.").

The fundamental structural problem with *Gaudin* error is that a judge not the jury ultimately decides guilt.

Such an error cannot be corrected on appeal by a harmless error analysis which by its very nature involves again judges, not jurors, deciding what should have been decided by the jury. As succinctly stated by this Court in *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986), "the error in such a case is that the wrong entity judged the defendant guilty."

Nor does it make sense, as at least one Circuit Court has argued, *United States v. Rogers*, 94 F.3d at 1519, n. 12, to distinguish *Sullivan* on the basis that the erroneous instruction there affected *all* elements of the offense, while the erroneous instruction here involved only *one* element. As this Court held in *Gaudin*, citing to *Sullivan v. Louisiana*, "We have held that these provisions (the Fifth and Sixth Amendments) require criminal convictions to rest upon a jury determination that the defendant is guilty of *every* element of the crime for which he has been charged, beyond a reasonable doubt." 115 S.Ct. at 2313 (emphasis added). A defendant is not entitled to a proper jury determination of "most" of the elements of the criminal offense or "all but one" of the elements of the criminal offense. "Close" is not a valid constitutional principle when considering a criminal conviction where liberty is at stake.

D. Certiorari Should be Granted to Resolve the Conflict.

This case offers this Court the opportunity to resolve a substantial conflict among the circuits on an important issue of federal law. It also permits the Court to answer the question which will necessarily remain unanswered

after *Rogers*: what if the element is not admitted by the defendant and the jury is not instructed on that element? This case is, therefore, peculiarly appropriate for the Court to exercise its discretion under Rule 10(a) of the Supreme Court Rules in granting a writ of certiorari. It also merits consideration for certiorari under Rule 10(c) of the Supreme Court Rules, because it affords this Court the opportunity to correct the decisions of the Courts of Appeal applying harmless error analysis to *Gaudin* error, contrary to this Court's decision in *Sullivan v. Louisiana*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Eddie CASTLEBERRY, Defendant-Appellant.

No. 96-8596.

United States Court of Appeals,
Eleventh Circuit.

June 23, 1997.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. 1:95-CR-370-1 (WBH), Willis B. Hunt, J., for violations of the Hobbs Act, and he appealed. The Court of Appeals, Fay, Senior Circuit Judge, held that: (1) government had only to establish that extortion had minimal effect on interstate commerce, rather than substantial effect, to support conviction; (2) instruction on interstate commerce element of offense was proper; and (3) local prosecutor's written entries in pocket calendar book came with hearsay exception for coconspirator statements.

Affirmed.

John R. Martin, Atlanta, GA, C. Michael Abbott, Atlanta, GA, for Defendant-Appellant.

William McKinnon, Asst. U.S. Atty., Randy Chartash, Asst. U.S. Atty., Atlanta, GA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK, Circuit Judge, and FAY and ALARCON*, Senior Circuit Judges.

FAY, Senior Circuit Judge:

Defendant Eddie S. Castleberry was convicted for violations of the Hobbs Act. On appeal, Castleberry's main contention is that under *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Government must now show a substantial effect, instead of only a minimal effect, on interstate commerce to support a conviction under the Hobbs Act. Castleberry further argues that because the Government's evidence failed to establish a substantial (or even a minimal) effect on interstate commerce, the district court erred in denying his motions under Rule 29 of the Federal Rules of Criminal Procedure. He also claims that the district court erroneously instructed the jury on the interstate commerce element of the Hobbs Act and erred in certain evidentiary rulings. We reject all of Castleberry's arguments and affirm his convictions.

Castleberry was a private attorney in Atlanta, Georgia. Kenneth London was Assistant Solicitor in the Atlanta Traffic Court. As Assistant Solicitor, London prosecuted driving under the influence ("DUI") cases and had access to the case files created for each DUI case.

On September 5, 1995, Castleberry was charged in a five count indictment. Count one of the indictment charged Castleberry with conspiring to violate the Hobbs

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Act, 18 U.S.C. § 1951 (1994), with London.[1] According to the indictment, Castleberry obtained money from individuals who had DUI charges pending in the Atlanta Traffic Court and then paid part of this money to London, who, in return for the payment, illegally "fixed" or "disposed" of Castleberry's clients' DUI cases. Counts two through five of the indictment charged Castleberry, aided and abetted by London, with four substantive counts of extortion in relation to four specific individual clients. 18 U.S.C. §§ 1951, 2 (1994). On February 26, 1996, a jury convicted Castleberry on all counts. Castleberry timely appealed the judgment of conviction.

I. Interstate Commerce

The Hobbs Act prohibits extortion or robbery that "in any way or degree obstructs, delays, or affects commerce or the movements of any article or commodity in commerce." 18 U.S.C. § 1951(a)(1994); *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273-74, 4 L.Ed.2d 252 (1960) ("There are two essential elements of a Hobbs Act crime: interference with commerce, and extortion."). Castleberry argues that in order to satisfy the interference with commerce element of the Hobbs Act the Government must show that the extortionate activity substantially affected interstate commerce. In support of this argument, Castleberry relies on *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

In *Lopez*, the Supreme Court considered whether Congress exceeded its congressional authority under the

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[1] London died in April 1993.

Commerce Clause[2] in enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A)(1988). 514 U.S. at 551-52, 115 S.Ct. at 1626. This Act prohibited a person from possessing a gun while in a "school zone."

The Court listed three broad categories of activity which Congress could regulate pursuant to the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities which have "a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 559, 115 S.Ct. at 1629-30. After concluding that the Gun-Free School Zones Act only involved the third category, *Id.* at 559-60, 115 S.Ct. at 1630, the Court was uncertain whether an activity Congress intended to regulate must simply affect interstate commerce or substantially affect interstate commerce. *Id.* "The Court concluded that the proper test for a statute which 'neither regulates a commercial activity nor contains a [jurisdictional] requirement that the [regulated activity] be connected in any way to interstate commerce' was whether the regulated activity 'substantially affects' interstate commerce." *United States v. Atcheson*, 94 F.3d 1237, 1241 (9th Cir.1996) (quoting *Lopez*, 514 U.S. at 551-52, 559-60, 115 S.Ct. at 1626, 1630), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1096, 137 L.Ed.2d 229

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[2] The Commerce Clause provides: "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . " *U.S. Const.* art. I, § 8.

(1997)[3]. Applying these principles to the Gun-Free School Zones Act, the Court concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567, 115 S.Ct. at 1634. Accordingly, the Court held that the Act violated the Commerce Clause. *Id.* at 551-52, 115 S.Ct. at 1626.

Prior to *Lopez*, this Court had held that the Government need only prove that extortionate activity has a minimal effect on interstate commerce to satisfy the Hobbs Act jurisdictional requirement. *United States v. Alexander*, 850 F.2d 1500, 1503 (11th Cir.1988); *United States v. Jackson*, 748 F.2d 1535, 1537 (11th Cir.1984). Castleberry contends the Supreme Court's decision in *Lopez* alters the jurisdictional nexus, requiring the Government to prove a substantial effect on interstate commerce, and not simply a minimal effect. We disagree.

Since *Lopez* was decided, this Court has not directly decided whether *Lopez* has changed "the measure of evidence necessary to support the interstate commerce element of a Hobbs Act prosecution." *See United States v. Frost*, 77 F.3d 1319, 1320 (11th Cir.1996), *judgment vacated on other grounds*, ___ U.S. ___, 117 S.Ct. 1816, ___ L.Ed.2d ___ (1997). However, this Court has rejected similar *Lopez* challenges in other contexts. *United States v. Jackson*, 111 F.3d 101 (11th Cir.1997) (Drug-Free School Zones Act did not exceed congressional authority under the Commerce

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[3] We note that the authoring Judge of the Ninth Circuit's *Atcheson* decision is none other than Judge Alarcon.

Clause); *United States v. McAllister*, 77 F.3d 387 (11th Cir.) (finding constitutional a statute which makes possession of a firearm by a felon a criminal offense), *cert. denied*, ___ U.S. ___, 117 S.Ct. 262, 136 L.Ed.2d 187 (1996); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995) (holding that Freedom of Access to Clinic Entrances Act of 1994 was within Congress' Commerce Clause power).

In *McAllister*, the defendant, relying on *Lopez*, argued that Congress in enacting 18 U.S.C. § 922(g)(1), which makes it unlawful for a felon to "possess in or affecting commerce, any firearm or ammunition," exceeded its Commerce Clause power by regulating the mere possession of a gun. We rejected defendant's *Lopez'* argument mainly because the language of § 922(g)(1) contained a jurisdictional element ("possess in or affecting commerce, any firearm or ammunition,"), which the statute in *Lopez*, 18 U.S.C. § 922(q), did not contain. *McAllister*, 77 F.3d at 390.

Like the statute involved in the *McAllister* case, the Hobbs Act contains a jurisdictional element. *See* 18 U.S.C. § 1951(a) ("in any way or degree obstructs, delays, or affects commerce or the movements of any article or commodity in commerce"). It is this jurisdictional element of the Hobbs Act that defeats Castleberry's *Lopez* challenge. Unlike the statute involved in *Lopez*, the Hobbs Act contains a jurisdictional requirement that the extortion be connected in any way to interstate commerce. Because the Hobbs Act contains this jurisdictional element, we continue to hold that the Government only needs to establish a minimal effect on interstate commerce to support a violation of the Hobbs Act.

We also note that while this Court has not specifically determined *Lopez'* impact on the interstate commerce element of the Hobbs Act, other circuit courts have addressed that issue. All of the courts that have addressed the issue have held that, despite *Lopez*, the Government still needs to show only a minimal effect on interstate commerce to support a conviction under the Hobbs Act. *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir.1996) ("Because the Hobbs Act is concerned solely with *inter* state, rather than *intra* state, activities, we conclude that *Lopez's* 'substantially affects' test is not applicable."), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1096, 137 L.Ed.2d 229 (1997); *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir.1995) ("We therefore conclude the Hobbs Act represents a permissible exercise of the authority granted to Congress under the Commerce Clause, and that under *Lopez*, all the government need show is a *de minimis* effect on interstate commerce in order to support a conviction under the Act."), *cert. denied*, ___ U.S. ___, 116 S.Ct. 966, 133 L.Ed.2d 887 (1996); *United States v. Stillo*, 57 F.3d 553, 558 n. 2 (7th Cir.) ("Nor did the *Lopez* decision undermine this Court's precedents that minimal potential effect on commerce is all that need be proven to support a conviction."), *cert. denied*, ___ U.S. ___, 116 S.Ct. 383, 133 L.Ed.2d 306 (1995); *see also United States v. Farmer*, 73 F.3d 836, 843 (8th Cir.) (after *Lopez* decision, robbery of local convenience store satisfies effect on interstate commerce), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2570, 135 L.Ed.2d 1086 (1996). The logic and reasoning expressed in our sister circuit courts' opinions is further persuasive support that *Lopez* did not change the measure of evidence needed to

support the interstate commerce element of a Hobbs Act case.

II. The Sufficiency of the Evidence

Having concluded as a matter of law that the Hobbs Act only requires a minimal effect on interstate commerce to support a conviction, we next consider whether the Government's evidence was sufficient to establish such in this case. Castleberry challenges the denial of his motions for judgment of acquittal based on the sufficiency of the evidence. In reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the Government and draw all inferences and credibility choices in favor of the jury's verdict. *United States v. Adair,* 951 F.2d 316, 318 (11th Cir.1992). Castleberry's conviction will be affirmed if "any reasonable construction of the evidence allowed the jury to find appellant [ ] guilty beyond a reasonable doubt." *United States v. McKinley,* 995 F.2d 1020, 1025 (11th Cir.1993). Under this standard and based upon our review of the record, we hold there is sufficient evidence to support the jury's finding that Castleberry's extortionate activity had at least a minimal effect on interstate commerce.

In attempting to establish an interstate commerce element in this case, the Government presented the testimony of Thomas Enright, an official with the U.S. Department of Transportation. In general, Mr. Enright testified to the effect of non-prosecuted DUI cases on interstate commerce. According to Mr. Enright's testimony, if a person knows he or she can get away with drinking and driving, the more likely the person is to drink and drive.

Mr. Enright went on to testify that the more often a person drinks and drives, the more likely a person is to have an accident. DUI accidents account for economic losses of over 46 billion dollars a year. Out of this amount, a percentage of the medical, social security disability, and unemployment costs are funded by the Federal Government. In addition, Mr. Enright commented on the demoralizing effect that the failure to prosecute DUI cases has on police officers. Utilizing this testimony, the Government argues that the DUI ticket scheme engaged in by Castleberry and London had at least a minimal impact on interstate commerce.

The Government also presented evidence that fines paid in connection with DUI offenses went into the City of Atlanta's general fund. Out of the general fund, the City of Atlanta purchased goods from companies involved in interstate commerce. For example, Dr. William McLemore testified that because the State of Georgia had no oil refineries, all of the gasoline purchased with money from the City's general fund came from interstate commerce. Pursuant to state law, the City of Atlanta cannot run a deficit. Because London and Castleberry were fixing DUI cases, the City of Atlanta did not collect all the fines it was entitled to and consequently Castleberry's actions decreased the amount of revenue the City was able to spend in interstate commerce.

Castleberry contends the Government's interstate commerce evidence is "thin and speculative, concerning matters that 'might' have occurred rather than matters that 'actually' occurred." Castleberry cites *United States v. Frost*, 77 F.3d 1319 (11th Cir.1996), *judgment vacated on other grounds*, ___ U.S. ___, 117 S.Ct. 1816, ___ L.Ed.2d ___

(1997), as his best case to support his position that the Government's evidence is insufficient.

In *Frost*, we found that the Government's evidence failed to show that the resignation of a city council member from a six-member city council would affect interstate commerce. *Frost*, 77 F.3d at 1320. In accordance with this finding, we dismissed the defendants' Hobbs Act convictions. Castleberry's reliance on *Frost* is misplaced. In fact, we find *Frost* to be supportive of the conviction. Extending the analysis used in *Frost* to the facts of our case, we find that the Government's evidence demonstrated that Castleberry and London's fixing DUI cases directly affected interstate commerce. We have already determined as a matter of law that the impact on commerce does not need to be substantial; all that is required is minimal impact. Resolving inferences from Mr. Enright's testimony in favor of supporting the verdict, we conclude that the jury could have found Castleberry guilty of the Hobbs Act interstate commerce element.

Our conclusion is reinforced by the opinion of the Fifth Circuit in *United States v. Wright*, 797 F.2d 245 (5th Cir.1986). The facts of *Wright* are extremely similar to ours. In *Wright*, two attorney defendants appealed their convictions under the Hobbs Act. The defendants had violated the Hobbs Act, "by conspiring to extort money from a law firm and its clients in exchange for not prosecuting drunken drivers. . . . " *Wright*, 797 F.2d at 246.

On appeal, the defendants claimed that the government's evidence failed to establish that the extortion affected interstate commerce. *Wright*, 797 F.2d at 248. In a

bench trial, the district court disagreed. Relying on testimony similar to Mr. Enright's, *see Wright* 797 F.2d at 249, the district court concluded that the government had proved the interstate commerce element of the Hobbs Act. Our sister circuit court found the evidence sufficient for the trial judge to find that the attorney defendants' extortion affected interstate commerce. We have no problem concluding that the jury's construction of the evidence in this case could likewise find Castleberry guilty of the Hobbs Act jurisdictional element.

III. The Jury Instruction

We next consider Castleberry's contention that the district court erroneously instructed the jury. In instructing the jury on the interstate commerce element of the Hobbs Act, the district court gave the following jury instruction:

> While it is not necessary that the Government prove that the defendant specifically intended to interfere with interstate commerce, it is necessary concerning this issue that the Government prove that the natural consequences of the acts alleged in the indictment would delay, interrupt or adversely affect "interstate commerce." The phrase "interstate commerce" means the flow of commerce or business activities between two or more states. It also means commerce between places within the same state but passing through any place outside of that state. I instruct you that if you believe beyond a reasonable doubt that the defendant committed extortion as charged in the indictment, and you believe that the Government's evidence regarding the

> impact on interstate commerce beyond a reasonable doubt, then, as a matter of law, the jurisdictional requirements of the Hobbs Act relating to interstate commerce under Section 1951 of Title 18 of the United States Code have been met.

R11-1490. Castleberry claims this instruction was in error because the district court took the interstate commerce element away from the jury. *See United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (holding that the Constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."). We disagree.

The district court has broad discretion in formulating a jury charge as long as the charge as a whole is a correct statement of the law. *United States v. Perez-Tosta*, 36 F.3d 1552, 1564 (11th Cir.1994). This Court will not reverse a conviction unless we find that issues of law were presented inaccurately or that the charge improperly guided the jury in such a substantial way as to violate due process. *Id.*

Contrary to Castleberry's assertion that the district court decided the interstate commerce nexus, the plain reading of the jury instruction leads us to conclude that the district court correctly instructed the jury that it was up to them to decide the issue. "I [the judge] instruct you [the jury] that if you [the jury] believe beyond a reasonable doubt that the defendant committed extortion as charged in the indictment and you [the jury] believe that the Government's evidence regarding the impact on interstate commerce beyond a reasonable doubt. . . . "

While the jury instruction may be a bit odd in incorporating the "as a matter of law" language, the district court did not misstate the interstate commerce issue "in such a substantial way as to violate due process."

Castleberry is correct that *Gaudin* requires a jury, and not a judge, to determine each element of the crime to which he is charged with. However, Castleberry is simply wrong in arguing that the jury in his case did not decide each element of his Hobbs Act convictions. It is clear to us that the jury decided the interstate commerce element. The district court complied fully with the teachings of *Gaudin,* when it instructed the jury to decide whether the Government's evidence had established an impact on interstate commerce.

IV. The Evidentiary Rulings

Finally, Castleberry argues that the district court erred in three evidentiary rulings: (1) the admission of entries from London's "DayTimers"; (2) admitting the testimony of three witnesses who paid London, but had no connection to Castleberry; and (3) improperly limiting the cross-examination of a witness. In reviewing a district court's evidentiary decisions, our standard of review is whether the district court abused its discretion. *See United States v. Veltmann,* 6 F.3d 1483, 1491 (11th Cir.1993) ("Evidentiary rulings challenged on appeal will not be overturned absent clear abuse of discretion").

The first alleged evidentiary error concerns the district court's admission of two entries from London's pocket calendar book called "DayTimers." The two entries from London's DayTimers consisted of two lists of

names and initials with a three or four digit number next to each name or set of initials. The written entries were in London's handwriting. One of the entries was dated June 30, 1987, and the other entry was on a page dated July 1, 1987 through September 30, 1987. Included in the lists of names and initials are entries with the name Eddie and the initials E.S.C. Next to these names or initials are various numbers ranging from 150 to 1250. There were other names and initials listed in the entries. For example, the entries contained the names Rozen and Cochren with various numbers next to these two names. During the trial, Roger Rozen and a James Cochran, each testified that they paid London various amounts to fix DUI cases.

Both sides agree that the entries can only be admissible if they are considered nonhearsay, Fed.R.Evid. 801(d)(2)(E), or fall within an exception to the hearsay rule. Fed.R.Evid. 804(b)(3), (5). We conclude that the entries were admissible as nonhearsay under Fed.R.Evid. 801(d)(2)(E).

Fed.R.Evid. 801(d)(2)(E) provides that an admission by a party-opponent will not be considered hearsay if "[t]he statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." In order for the coconspirator statement to be admissible under this rule as nonhearsay, "there must have existed a conspiracy involving the declarant and the defendant, and the statement must have been made during the course and in furtherance of the conspiracy." *United States v. Turner*, 871 F.2d 1574, 1581 (11th Cir.1989). Castleberry does not strenuously contest that the entries are statements and that a conspiracy existed between himself and London.

However, Rule 801(d)(2)(E) also requires that the statement be both "during the course" and "in furtherance of" the conspiracy. Castleberry claims that because the entries were neither made at the time of the conspiracy nor in furtherance of it, the district court erred in admitting them. The DayTimers' entries were located on pages containing dates in the year 1987 (June 30, 1987 and July 1, 1987 through September 30, 1987). Count one of the indictment states "[b]eginning on a date which is unknown to the Grand Jury, but which occurred on or before January 1, 1988, and continuing until on or about April 1, 1993, . . . " Based on these dates and relying on the "during the course" language in Rule 801(d)(2)(E), Castleberry contends the entries were preconspiracy. We disagree.

The dates of the entries are reasonably close to the dates of the conspiracy alleged in the indictment. The grand jury indictment clearly states "beginning on a date which is unknown to the Grand Jury, but which occurred on or before January 1, 1988. . . . " R1-1 (emphasis added). Moreover, both Rozen and Cochran testified that they paid London prior to the January 1, 1988 date alleged in the indictment. Rozen testified that he sent a check dated March 27, 1987, in the amount of $500.00 to London. The five hundred dollar check matches the amount next to Rozen's name on the DayTimer entry dated June 30, 1987. In addition, Rozen produced a check for $200.00 dated July 20, 1987, that matched the amount next to Rozen's name for the DayTimer entry dated July-September 1987. Rozen and Cochran's testimony corroborates the language and dates of the indictment and satisfies the "during the course" requirement of Fed.R.Evid. 801(d)(2)(E).

We next consider Castleberry's argument that the entries were not made "in furtherance of the conspiracy." Whether or not the entries are admissible as evidence is a preliminary question for the court to decide. Fed.R.Evid. 104(a). As we have previously stated:

> Before admitting a coconspirator's statement over an objection that the statement does not qualify under Rule 801(d)(2)(E), a district court must be satisfied that the party offering the testimony has proved by a preponderance of the evidence that . . . the statement was made during the course and in furtherance of the conspiracy.

United States v. Byrom, 910 F.2d 725, 734 (11th Cir.1990) (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987)). The district court's factual finding that a statement is made in furtherance of a conspiracy pursuant to Rule 801(d)(2)(E) is reviewed under the clearly erroneous standard. *Byrom*, 910 F.2d at 734. The entries need not be necessary to the conspiracy; they must only further the conspiracy. *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir.1988).

In our case, the district court found as a matter of fact that London's handwritten entries of monies Castleberry owed London were made in furtherance of the conspiracy. We do not believe the district court was clearly erroneous in making this factual finding. Indeed, Castleberry fails to offer any reason why this factual finding was erroneous. Accordingly, we do not believe the district court erred in admitting the two entries from London's DayTimers.

As to Castleberry's other two evidentiary challenges, we summarily dismiss them. We do not believe the district court abused its discretion in admitting the testimony of witnesses who paid London on behalf of clients other than those of Castleberry or individuals who paid London directly. Nor do we believe the district court abused its discretion in restricting Castleberry's cross-examination of Lisa Williams. *See* R2-51 (We find sufficient the district court's written order that explained its reasons for sustaining "the Government's objection to defendant's cross-examination of Williams and presentation of extrinsic evidence.").

V. Conclusion

For the reasons stated above, we affirm Castleberry's convictions.

AFFIRMED.

United States Court of Appeals

For the Eleventh Circuit

No. 96-8596

D. C. Docket No. 1:95-CR-370-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDDIE CASTLEBERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before BLACK, Circuit Judge, and FAY and ALARCON*, Senior Circuit Judges.

JUDGMENT

(Filed Jun. 23, 1997)

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable Arthur L. Alarcon, Senior U. S. Circuit Judge for the Ninth Circuit, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of convictions of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: June 23, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/8/97

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8596

United States of America,

Plaintiff-Appellee,

versus

Eddie Castleberry,

Defendant-Appellant.

On Appeal from the United States District Court
Northern District of Georgia

(Filed Aug. 6, 1997)

ORDER:

(X) The motion of appellant Eddie Castleberry for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant Eddie Castleberry for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has

been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

STATUTES INVOLVED IN THE CASE

18 U.S.C. § 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place

outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

(June 25, 1948, c. 645, 62 Stat. 793.)